IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 6901 of 2007
With
CRIMINAL MISC.APPLICATION No. 6904 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PATEL PRAVINBHAI KHIMJIBHAI PAGDHAR - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR RR TRIVEDI for Applicant(s) : 1,MR BHAVESH P TRIVEDI for Applicant(s) : 1,
Mr. KT Dave, Addl.PUBLIC PROSECUTOR for Respondent(s) : 1,
MR RC KAKKAD for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 24/08/2007
ORAL COMMON JUDGMENT

Rule. Shri KT Dave, learned APP waives service of Rule on behalf of respondent No.1 State. Shri RC Kakkad, learned advocate waives service

of Rule on behalf of respondent No.2. As common question of law and facts arise and parties to the proceedings are the same in both these applications they are being disposed of by this common judgment and order.

2. Criminal Misc. Application No. 6901 of 2007 is filed by applicant original-accused No.2 for an appropriate order of quashing and setting aside the Criminal Complaint No. 5503 of 2006 pending before the learned JMFC, Jamnagar qua the applicant. Criminal Misc. Application No. 6904 of 2007 is filed by the very applicant original-accused No.2 for an appropriate order of quashing and setting aside the Criminal Complaint No. 5502 of 2006 pending in the Court of JMFC, Jamnagar qua applicant original-accused No.2. The aforesaid two criminal complaints are filed by the respondent No.2, original-complainant against the applicant original-accused No.2 in the Court of learned JMFC, Jamnagar for the offences under Section 138 read with 141 and 142 of The

Negotiable Instruments Act [hereinafter refered to as 'the Act'] alleging inter alia that the original-complainant is carrying on business in the name of Uday Trading Company; the same is a partnership firm; they are carrying on the business through agents; and they were knowing each other. It is further alleged in the complaints that the original-accused have entered into the business transaction on 4.3.2006 through one agent M/s. Ajeet Oils and purchased goods of Rape Seed/Mustard Oil worth Rs. 3,72,388 at Rs. 375.96 per 10 Kgs., in loose form and delivery was given to the accused persons through Golden Transport so far as Criminal Case No. 5503 of 2006 is concerned. Qua both criminal complaints two cheques were issued by the original-accused No.1 as proprietor/authorised signatory of M/s. Akshar Agro for an amount of Rs. 1,86,194 each; when the said cheques were deposited they were returned with an endorsement “account closed”; thereafter statutory notices were issued upon both the accused persons, however they refused to

accept the said notices; after the statutory period as the payment was not made the respondent No.1 original-complainant has filed the aforesaid two complaints for the offences under Section 138 and 141 of the Act wherein the learned JMFC has issued the summons upon the applicant for the offence under Section 138 of the Act; and hence the applicant has preferred the present applications under Section 482 of the Code of Criminal Procedure.

3. Shri Trivedi, learned advocate appearing on behalf of the respective applicants has vehemently submitted that so far as the applicant is concerned he is neither the partner and/or in any way connected with the firm M/s. Akshar Agro which has issued the cheques in question and the firm M/s. Akshar Agro which has issued the cheques in question is a proprietary firm and therefore the petitioner cannot be held vicariously liable under Section 141 of the Negotiable Instruments Act. It is further

submitted that even in the complaint there are no averments and/or any allegation that the applicant original-accused No.1 was in day to day affairs or management of the firm. It is submitted that the aforesaid submission is over and above the submission that the applicant is not in any way connected with M/s. Akshar Agro, a proprietary firm who has issued the cheques in question. It is also submitted that the applicant is neither a signatory to the cheques nor a proprietor of the firm who has issued the cheques and therefore no case is made out against the applicant under Section 138 of the Act. Therefore it is requested to quash and set aside the complaints qua the applicant original-accused No.2 and allow the present applications. Shri Trivedi, learned advocate has relied upon the Judgment of the Hon'ble Supreme Court in the case of ***Raghu Lakshminarayanan v. M/s. Fine Tubes,*** reported in **AIR 2007 S.C. 1634** in support of his submission and prayers.

4. On the other hand, both the applications are opposed by Shri Kakkad, learned advocate appearing on behalf of the respondent No.2 original-complainant in both the applications. He has submitted that while placing reliance upon the cheques in question i.e., at Page 29 it is submitted that the cheques in question were signed by the original-accused No.1 as Proprietor/Authorised Signatory and therefore it was not sure whether M/s. Akshar Agro is the proprietary firm or not. It is submitted that when he has signed as an Authorised Signatory it may not be a proprietary firm and therefore looking to the averments and the allegations in the complaint it is requested to dismiss both the applications. It is further submitted that the contentions and submissions made on behalf of the applicant are all defences which are required to be considered at the time of trial and therefore it is requested to dismiss both the applications.

4.1. Shri KT Dave, learned APP has requested to pass appropriate order considering the averments and allegations in the complaints.

5. Heard the learned advocates appearing on behalf of the respective parties. It is not in dispute that the entire transaction took place with M/s. Akshar Agro and in the cause-title it is mentioned that M/s. Akshar Agro, through its proprietor/administrators. It is required to be noted that cheques have been issued by M/s. Akshar Agro and signed by original-accused No.1 Patel Khimjibhai Khimjibhai. It is an admitted position that applicant original-accused No.2 is neither the signatory nor he has issued the cheques in question. In the complaints there are no averments and allegations that the applicant is in day to day affairs and management of the firm, M/s. Akshar Agro. It appears that M/s. Akshar Agro is a proprietary firm and original-accused No.1 Patel Sureshbhai Khimjibhai is the proprietor of the said firm. Under the

circumstances, the firm which has issued the cheques, i.e., Akshar Agro is neither a Company nor a Partnership Firm nor it is the case on behalf of the original-complainant that it is association of other individuals. As held and observed by the Hon'ble Supreme Court in the case of ***Raghu Lakshminarayanan [supra]***, A proprietory concern, however, stands absolutely on a different footing. A person may carry on business in the name of a business concern, but he being proprietor thereof, would be solely responsible for conduct of its affairs. A proprietary concern is not a Company. Company in terms of the explanation appended to Section 141 of the Negotiable Instruments Act, means any body corporate and includes a firm or other association of individuals. It is further observed by the Hon'ble Supreme Court in the said decision that if the offence has not been committed by a company, the question of there being a Director or is being vicariously liable, therefore would not arise. Under the

circumstances and considering the averments and allegations in the complaint and for the reasons stated above the applicant original-accused No.2 cannot be held vicariously liable under Section 141 of the Negotiable Instruments Act for the dishonour of the cheques in question. It cannot be said that the applicant original-accused No.2 has committed any offence as alleged under Section 138 read with Section 141 of the Negotiable Instruments Act. Under these circumstances, to continue the said criminal proceedings against the applicant original-accused No.2 would be an abuse of process of court particularly when the firm which has issued the cheques is a proprietary concern and this is a fit case to exercise the powers under Section 482 of the Code of Criminal Procedure and the case falls within the parameters of exercise of powers under Section 482 of the Code of Criminal Procedure.

6. For the reasons stated above, both the applications succeed. The proceedings of

Criminal Cases No. 5502 of 2006 and 5503 of 2006 pending in the Court of learned Chief Judicial Magistrate, Jamnagar, are quashed and set aside qua the applicant original-accused No.2 only.

Rule is made absolute accordingly in each of the applications.

[M.R. Shah, J.]

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